EDITOR'S NOTE

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Supreme Court, U.S.
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ORIGINAL

NO. 84-6558

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

DARRYL ELROY STEWART,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR THE CONSIDERATION OF MITIGATING CIRCUMSTANCES?

II. WHETHER THE TEXAS CAPITAL SENTENCING STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT CONTAINS NO PROVISIONS FOR DIRECTING AND INSTRUCTING THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES AT THE PUNISHMENT PHASE OF TRIAL?

III. WHETHER THE TEXAS LAW OF PARTIES AND CRIMINAL RESPONSIBILITY VIOLATES THE RATIONALE OF ENMUND V. FLORIDA, 458 U.S. 782 (1982), AND MATERIALLY REDUCES THE STATE'S BURDEN OF PROOF ON THE PUNISHMENT ISSUE?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is not yet published, is reproduced as Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals denied the Motion for Leave to File Petitioner's Motion for Rehearing on February 6, 1985.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the sixth, eighth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on February 6, 1980, in Harris County, Texas, for the murder of Donna Kate Thomas, while in the course of committing and attempting to commit the offense of burglary. Trial began on July 14, 1980, and on July 18, 1980, the jury found Petitioner guilty of the offense of capital murder. On July 21, 1980, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981). Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals, which on September 19, 1984, affirmed the conviction and sentence. Stewart v. State, No. 68,889 (Tex. Crim. App. Sept. 19, 1984) (en banc). Rehearing was denied on February 6, 1985.

STATEMENT OF FACTS

The statement of facts set forth in the petition for writ of certiorari is essentially correct.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. Jurek v. Texas, 428 U.S. 262 (1976), settled the question whether the Texas capital sentencing statute is unconstitutional because it precludes the jury from considering mitigating evidence. Furthermore, Petitioner's argument that the Constitution requires the trial court to guide the jury's consideration of aggravating and mitigating circumstances at the punishment phase of a capital murder trial was decided against Petitioner by Jurek and reaffirmed by this Court in Zant v. Stephens, 462 U.S. 862 (1983). Finally, the jury charge at punishment allowed the jury to assess the death penalty only if the conduct of Petitioner that caused the death was "committed

deliberately and with a reasonable expectation that the death of the deceased would result." The charge is unambiguous and tailored to focus the jury's attention on the individual defendant. Petitioner's death sentence was not imposed in violation of the eighth amendment.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case, and none exists. Further, this case presents only the question whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented herein.

II.

WHETHER THE TEXAS CAPITAL SENTENCING STATUTE ADEQUATELY ALLOWS FOR CONSIDERATION OF MITIGATING CIRCUMSTANCES WAS SETTLED BY THIS COURT IN JUREK V. TEXAS.

In Jurek v. Texas, 428 U.S. 262 (1976), this Court upheld the Texas capital-sentencing statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981), against constitutional attacks under the eighth and fourteenth amendments. The Court held that because Texas has severely limited the statutory offenses for which capital punishment might be imposed to offenses involving at least one aggravating circumstance, has allowed for mitigating circumstances relating to the individual defendant at the punishment stage, and has provided for prompt judicial review, "Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under the law" and the "system serves to assure that sentences of death will not be

'wantonly' or 'freakishly' imposed." Id. at 276. With respect to the special issue number two, Jurek held:

> The second Texas statutory question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death . . . . In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:
>
> > In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.
> >
> > * * *
> >
> > Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it.

Id. at 272-73 (citation omitted).

Petitioner's argument that the Texas capital sentencing statute is constitutionally infirm because the first special issue does not adequately allow for consideration of mitigating circumstances ignores Jurek's holding that the second special issue serves that function. Petitioner is essentially asking this Court to overrule Jurek.

III.

WHETHER THE CONSTITUTION REQUIRES SPECIFIC JURY INSTRUCTIONS FOR BALANCING AGGRAVATING AND MITIGATING CIRCUMSTANCES WAS SETTLED BY THIS COURT IN ZANT V. STEPHENS.

Petitioner argues at length that the constitution requires specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and condemns Texas for failing to have adopted such a system. This contention was specifically rejected by this Court in Zant v. Stephens, 462 U.S. 862 (1983). Petitioner apparently ignores this Court's holding in Zant and for obvious reasons makes no effort to distinguish the decision. In Zant, this Court reaffirmed its position in Jurek that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. The Court again recognized that in Texas the jury's discretion is channeled by the narrowing categories of murders for which the death sentence may be imposed, and that the statutory questions presented to the sentencing jury permitted the defendant to bring mitigating circumstances to the jury's attention. 462 U.S. at 875-76 n.13.

IV.

THE RATIONALE OF ENMUND V. FLORIDA IS NOT VIOLATED BY APPLICATION OF THE TEXAS LAW OF PARTIES AND CRIMINAL RESPONSIBILITY TO THE GUILT-INNOCENCE PHASE OF A CAPITAL MURDER TRIAL.

Petitioner argues that the Texas law of parties and criminal responsibility, Tex. Penal Code Ann. §§ 7.01-7.02 (Vernon 1974), as applied to the guilt/innocence phase of a capital murder trial, violates the rational of Enmund v. Florida, 458 U.S. 782 (1982), and materially reduces the state's burden of proof on the deliberateness issue. Specifically, he argues that a finding of guilt of the substantive offense under the Texas law of criminal responsibility requires a jury to affirmatively answer special issue number one, "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or

another would result," Tex. Code Crim. Proc. Ann. art. 37.071 (b)(1) (Vernon 1981), as a matter of course, unless the jury is given specific balancing instructions to guide and focus its consideration of the particularized circumstances of the individual offense and the individual offender. His argument rests on the erroneous premises that (1) the law of parties applies to the punishment phase of a capital murder trial in Texas; (2) the special issues are insufficient to focus the jury's attention on the individual defendant; and (3) a capital sentencing jury is incapable of distinguishing between the required proof as to guilt issues and punishment issues. It also rests on the assumpton that Enmund requires specific jury findings that the defendant killed, intended to kill, or attempted to kill.

Petitioner was convicted of capital murder under the Texas law of parties and of criminal responsibility. Tex. Penal Code Ann. §§ 7.01, 7.02 (Vernon 1974). Under these provisions, a non-triggerman may be convicted of the substantive offense of capital murder, which is punishable by either life imprisonment or death, for the acts of a co-conspirator if the murder was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Contrary to Petitioner's assertions, the law of parties is not applicable to the punishment phase of a capital murder trial. Green v. State, 682 S.W.2d 271, 286-87 (Tex. Crim. App. 1984) (en banc). 1/ Under the Texas bifurcated trial system, the jury determines punishment by answering three special issues after a separate sentencing hearing. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981). Texas construes the special issues as

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1/ The Green decision, delivered prior to the opinion of the court below, expressly overruled Wilder and Armour v. State, 583 S.W.2d 349 (Tex. Crim. App. 1979). Thus, Petitioner's reliance on Wilder and Armour is incorrect. See Petition for Writ of Certiorari at 22-23.

"clearly forcus[ing] the jury's attention on the individual defendant." Green v. State, 682 S.W.2d at 286.

Here, the jury was instructed:

> Was the conduct of the Defendant, Darryl Elroy Stewart that caused the death of the deceased, Donna Kate Thomas, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(Tr. 65-66)(emphasis added). A unanimous jury found in the affirmative. The record reflects that no mention of the Texas law of parties or criminal responsibility was made in the court's charge at punishment (Tr. 64-66).

In Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 224 (1984), the Fifth Circuit grappled with the question whether the Texas sentencing instructions invoked Skillern's personal criminal responsibility for the acts of the accomplice:

> The instructions at the sentencing hearing on their face thus required the jury to find beyond a reasonable doubt that Skillern's conduct that caused the victim's death was committed deliberately and with the reasonable expectation that the victim's death would result. It might have been preferable that an additional instruction have been given that the Texas law of a party's criminal responsibility for the act of another did not supply the accused's deliberate intent and reasonable expectation that death would result, a prerequisite for imposition of the death penalty. However, no request was made for a special instruction to this effect, nor was any objection made to the charge as given. We cannot say that the sentencing instructions themselves permitted the jury to find that the requisite deliberate intent or contemplation to kill could be based solely upon the accomplice Sanne's killing of the victim, in violation of Enmund.

Id. at 848. Like Skillern, the jury instructions given in the court's charge at punishment were limited to a delineation of the special issues set forth in the Texas statute. Additionally, there was no request for any special instruction that the Texas law governing a party's criminal responsibility for the acts of another does not supply the accused's deliberate intent and reasonable expectation, nor was there any objection to the

court's charge. Further, the state's closing argument at punishment did not create any ambiguity in the jury instruction. The state's closing argument was centered on the theory that Petitioner was, in fact, the actual triggerman. Moreover, whatever questions the jury may have had in this regard were answered by the defense's argument that in order to answer the first special issue in the affirmative, the jury would have to believe that Petitioner's own conduct caused the victim's death (SF Vol. VI 2515). 2/

Petitioner's premise that, as a matter of Texas law, "knowingly" and "intentionally" as set forth in the charge at the guilt-innocence stage, is linguistically equivalent to the "deliberateness" issue as set forth in the punishment charge was expressly rejected by the court below. Stewart v. State, No. 68,889, at 6. Moreover, Texas recognizes "deliberately," as set forth in special issue number one, to be a word of common usage so that its definition is not required in the jury charge at the

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2/ MR. MUSSLEWHITE: You won't find [the law of parties] in here. You get to the Special Issue No. 1 and here's where you go. It defines who the Defendant is in the charge, Darryl Elroy Stewart. This is where it is, right here. Special Issue No. 1: Whether the conduct of the Defendant Darryl Elroy Stewart caused the death of the deceased. Well, here you come to it. You are going to get yourself to a point, was his conduct -- was he the triggerman. That's where you are.

* * *

Was the conduct of the Defendant Darryl Elroy Stewart that caused the death of Donna Kate Thomas committed deliberately and with reasonable expectation that the death of the deceased or of someone else would result. You are going to have to believe beyond a reasonable doubt that Darryl Elroy Stewart's conduct caused her death, and it's just that simple. . . . Now you tell me if you believe beyond a reasonable doubt that his conduct caused that death. I submit to you that there is a ton of doubt.

(SF Vol. VI 2514-15)(emphasis added).

punishment phase of a capital murder trial. (See, Pulley v. Harris, __ U.S. __, __, 104 S.Ct. 871, 879 n.10 (1984), recognizing that the Texas sentencing proceedings "have a common core of meaning at that criminal juries should be capable of understanding them"; Milton v. Procunier, 744 F.2d 1091, 1096 (5th Cir. 1984), cert. denied, __ U.S. __, 105 S.Ct. 2050 (1985), holding that the word "deliberately" has a "plain meaning of sufficient content that the discretion left to the jury was no more than that inherent in the jury system itself.") The defense is entitled to argue at the punishment phase whatever inferences they wish the jury to draw from the wording of the special issues. Here, defense counsel argued that "intentionally" and "knowingly" are not definitional equivalents of "deliberately" (SF Vol. 2526).

Petitioner's premise that Enmund requires the jury to make a specific finding that the defendant was himself a killer, or that he intended to kill, or attempted to kill is erroneous. Petition for Writ of Certiorari at 36. As the court below correctly held, Enmund does not require such a finding. Stewart v. State, No. 68,889, at 11. The focus of Enmund is on the sufficiency of the evidence to demonstrate that the defendant killed or attempted to kill, intended to kill or contemplated a killing. 458 U.S. at 801. See Skillern v. Estelle, 844 F.2d at 844. Here, there is substantial evidence that Petitioner was actually the triggerman, and Petitioner does not argue otherwise. Stewart v. State, No. 68,889, at 9-10.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

DARRYL ELROY STEWART *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 84–6558. Decided October 7, 1985

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

The petitioner in this case seeks no revolutionary expansion of the principles underlying this Court's current death-penalty jurisprudence. All he asks is the benefit of existing law as proclaimed by a majority of this Court. This Court has declared that a sentence of death may not be imposed on one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982). Yet the Court's refusal to consider petitioner's case countenances just that result. Even if I believed, therefore, that the death penalty could constitutionally be imposed under any circumstances,[1] I would grant certiorari in this case and vacate the death sentence imposed here.

I

At his murder trial, petitioner Darryl Elroy Stewart and his accomplice Kelvin Kelly provided conflicting theories about the crime. According to Stewart's statement, which the state introduced at trial, he and Kelly were walking past the deceased's apartment when Kelly saw through the open

[1] I continue to adhere to my view that the death penalty is, in all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring).

door a stereo that he wanted to steal. Kelly told Stewart that he was going to run in and grab the stereo, and instructed Stewart to stand guard at the door. Stewart heard a woman scream; heard Kelly attempt to force sexual relations on her; saw glimpses of a struggle; and heard two shots. Thus, Stewart's statement indicated that he agreed to assist in Kelly's theft of the stereo; that Kelly strayed from the plan to steal the stereo and attempted to commit a sexual offense against the occupant of the apartment; and that during the course of this offense Kelly killed the victim. If Stewart's account of the crime is accepted, he did not himself kill, did not attempt to kill, and did not intend that a killing would take place. According to Kelly, however, it was Stewart who entered the apartment to commit robbery, Stewart who had the gun, Stewart who attempted a sexual assault on the victim, and Stewart who killed her, while Kelly waited at the door; the state introduced some evidence corroborating this story. Kelly was promised, in exchange for his testimony, that he would receive no more than 50 years in prison.

II

The jury was asked to resolve this conflicting evidence and determine the guilt or innocence of Stewart on the murder charge. In order to guide the jury in that endeavor, the trial judge gave a lengthy instruction on the Texas "law of parties," set out in full in the margin.[2] The instructions pro-

[2] The judge charged the jury as follows:

"Now, if you find from the evidence beyond a reasonable doubt that . . . the Defendant, Darryl Elroy Stewart, did while in the course of committing or attempting to commit burglary of a habitation, . . . intentionally caused [sic] the death of [the victim] by shooting her with a gun, then you will find the Defendant guilty of Capital Murder, as charged in the Indictment. Or if you find from the evidence beyond a reasonable doubt that . . . Kelvin Kelly and Darryl Elroy Stewart entered into a conspiracy to burglarize the habitation . . ., and that pursuant thereto they did carry out or attempt to carry out such conspiracy to commit burglary, and while in the course of committing such burglary, if any, Kelvin Kelly did intentionally cause the death of [the victim] by shooting her with a gun and that the

vided the jury with two theories of capital murder. First, the jury could find Stewart guilty of having intentionally shot the victim himself. Alternatively, the jury could find the following series of facts: that Stewart conspired to commit burglary; that the murder was committed by Kelly in the course of the burglary; that Stewart was *intentionally* aiding Kelly in the execution of the *burglary* at the time that Kelly committed the murder; and that the murder was an offense that "should have been anticipated" as a result of the conspiracy. Either of the two findings would support a verdict of guilty of capital murder.

The jury returned a verdict of guilty. Defense counsel requested that the jury be instructed to specify upon which of the two murder offenses it had convicted Stewart, but the trial judge denied the request. The trial proceeded to the sentencing phase and petitioner was sentenced to die.

III

Under the Texas capital murder statute, a murder does not constitute capital murder merely because it was committed in the course of a burglary or other specified felony. The statute explicitly provides that the murder must have been committed "intentionally" in the course of the other felony. Tex. Penal Code § 19.03(a)(2) (Supp. 1985). In theory, therefore, a person cannot be required to face the death penalty without having acted with an intent to kill. Ironically, it was this

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Defendant, Darryl Elroy Stewart, pursuant to said conspiracy, if any, with the intent to promote, assist, or aid Kelvin Kelly in the commission or attempted commission of the said burglary, then and there, at the time of the shooting, if any, was acting with and aiding Kelvin Kelly in the execution or attempted execution of said burglary, and that the shooting of [the victim] followed in the execution of the conspiracy and in furtherance of the unlawful purpose of Kelvin Kelly and Darryl Elroy Stewart to commit the burglary, and that the shooting of [the victim] was an offense that should have been anticipated as a result of the carrying out of the conspiracy, then you will find the Defendant, Darryl Elroy Stewart, guilty of Capital Murder as charged in the Indictment."

reading of the statute that led this Court, in *Enmund*, to number Texas among the states that did not permit a capital sentence to be imposed upon a person convicted only of felony murder. 458 U. S., at 790 n. 7.

The *Enmund* Court's assessment, however, did not take into account the Texas "law of parties." Under that law, a person can be punished for an offense committed by another if he is "criminally responsible" for the other person. Tex. Penal Code § 7.01(a) (1974). The "criminal responsibility" of person *A* arises if *A* conspires to commit one felony and, in furtherance of that unlawful purpose, a co-conspirator in the first felony commits a second offense that "should have been anticipated" as a result of the conspiracy. The statute explicitly provides that *A* is guilty of the second offense even "though having no intent to commit it." Tex. Penal Code § 7.02(b) (1974); see *Ruiz* v. *State*, 579 S. W. 2d 206, 209 (1979) ("section 7.02(b) eliminates any necessity on the part of the State to prove the appellant had any intent to kill"). If the first offense is burglary, and the co-conspirator's second offense happens to be murder, then *A* may be deemed to have committed capital murder—even though the capital murder statute requires that the murder be committed intentionally in the course of a felony. The vulnerability of *A* to a capital charge under these circumstances, therefore, is entirely dependent on the acts of his co-conspirator; *A*'s own criminal accountability is not entirely within his control. In this application of the Texas statutes, every intent element that would normally guard against a capital charge for one who did not kill or intend to kill can be neatly circumvented and substituted with the fiction of vicarious intent. This is no mere theoretical quirk in state law; it is precisely the train of logic that quite possibly led to the death sentence in this case.

The entire conduct of petitioner's trial operated to buttress the prejudice created by the state's reliance on this illusory edifice of intent. For example, every juror who ended up on

petitioner's panel had stated in voir dire that he or she could find a non-triggerman guilty of capital murder and could impose the death sentence, even if the defendant had no specific intent to kill or to cause a killing.[3] Moreover, when the defense attorney attempted to explain to the jury that the law of parties—that is, vicarious intent—is not applicable to sentencing decisions, the trial court sustained the prosecutor's objection on the ground that counsel had misstated the law. Further, the judge did not instruct the jury that at the sentencing stage it was obliged to consider mitigating circumstances, such as the possibility that Stewart played a relatively minor role in the murder.[4] At every step of the way, one or more of these factors contributed to the likelihood that the jury failed to understand that it could not rely on vicarious intent to determine whether a defendant deserves to die.

Respondent contends that any deficiency in the jury's consideration of intent was cured at the sentencing phase. The judge's charge to the jury made it clear that imposition of the

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[3] Petitioner was sentenced before this Court issued its decision in *Enmund*. Petitioner has not made it clear whether defense counsel moved to strike the panel on the basis of its expressed willingness to impose death in the absence of intent. Even if he did not, however, the *Enmund* claim was preserved by counsel's request for a specification of the offense on which petitioner was convicted, his unsuccessful attempt to state to the jury that the law of parties does not apply at sentencing, and other related objections made at trial.

[4] Petitioner argues that this failure of the trial court to instruct the jury that it must consider mitigating circumstances violates *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), in which the Court held that a state may not preclude the sentencer from considering mitigating circumstances. *Id.*, at 113–114. Whether *Eddings* requires such instructions in all cases has not been explicitly decided. In this case, however, the lack of instruction concerning the jury's obligation to consider mitigating factors is particularly troubling, because the determination that the jury was expected to make at sentencing was strikingly similar to the findings it had already made at the guilt phase. Without guidance from the judge, it is quite possible that the jury believed the death sentence to be an automatic result of the conviction.

death sentence would be contingent upon a jury finding that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." See Tex. Code Crim. Proc., Art. 37.071(b) (1981). But the deliberateness of a burglary simply cannot be equated with an intent to kill. Moreover, it seems that the judge informed the jury, over defense objection, that the conduct which must be found to be deliberate as a prerequisite to the death sentence includes the conduct of the triggerman, as attributed to the defendant through the law of parties. Thus, the "individualized consideration" of the defendant's own culpability, required by *Lockett*, was entirely neglected. *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978). Nor can the constitutional demand for culpable intent be satisfied by the jury's finding that there was a reasonable expectation that death would result from the burglary. Such a finding does not even purport to be a measure of "personal responsibility and moral guilt," without which a defendant cannot be held accountable with his life. *Enmund* v. *Florida*, *supra*, at 801.

IV

This case differs from *Enmund* in only one pertinent respect. In *Enmund*, the only evidence implicating the defendant was an inference that he was waiting near the scene of the crime in order to help the principal perpetrators escape. 458 U. S., at 788. No conflicting evidence tended to show that Enmund may have been the actual killer. Here, in contrast, there was some evidence tending to establish Stewart as the triggerman. Nevertheless, we cannot be certain whether the jury imposed a sentence of death in the absence of an essential factual premise or not. For purposes of determining whether the Constitution has been violated, therefore, we simply cannot discount the grave possibility that Stewart was sentenced to death without the mental state that *Enmund* recognized as prerequisite to any such

sentence.[5] See *Sandstrom* v. *Montana*, 442 U. S. 510, 517 (1979). The courts should not permit unconstitutional death sentences to escape meaningful review merely because one can conceive of an alternative theory under which the execution can be imagined to fall within the terms of this Court's demands. The obligation of the courts is especially compelling here, because the state clearly had the option of eliminating any doubt on the issue by charging only the intentional murder offense and thus forestalling any *Enmund* problem. At least the state might have refrained from objecting to the defense counsel's attempts to inform the jury regarding the inapplicability of the law of parties at the sentencing phase. One cannot help but wonder why the state did not do anything to reduce the confusion, if it is indeed as confident as it claims to be that the jury's finding of guilt was based solely on intentional murder.

The likelihood that Stewart was convicted and sentenced to death on a theory of vicarious intent requires that *Enmund* be our guide in evaluating the legal claims put forward by petitioner. Like Enmund, Stewart has been sentenced to death "in the absence of proof" that he "killed or attempted to kill," or that he "intended or contemplated that life would be

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[5] This Term, the Court will consider whether *Enmund* requires that the jury make a finding of intent, or whether an appellate court may make the requisite finding upon review of the evidence. See *Bullock* v. *Lucas*, 743 F. 2d 244 (CA5 1984), cert. granted *sub nom Cabana* v. *Bullock*, No. 84–1236. If this Court determines in *Bullock* that a jury finding of intent is required, Petitioner's sentence will have to be vacated. Moreover, even if this Court resolves *Bullock* by concluding that an appellate finding of intent will suffice under *Enmund*, Petitioner's sentence should still be vacated, because such a finding could not be made by an appellate court in this case. Petitioner's jury did not explicitly convict on one offense or the other, and the evidence supporting an intentional murder conviction conflicts with the evidence supporting a conviction for felony murder. Thus, it would be impossible for an appellate court to divine which of the mutually exclusive sets of testimony was accepted by the jury and should accordingly be examined for indications of intent. We should grant this petition irrespective of *Bullock*.

taken." 458 U. S., at 801. Some disputed evidence suggested that Stewart had such intent, but we have no proof thereof, and we cannot tell from the verdict whether the jury so found.

V

Although this Court upheld the Texas capital-sentencing scheme against certain challenges in *Jurek* v. *Texas*, 428 U. S. 262 (1976), petitioner's case demonstrates that the statute must be measured against a different standard when the state seeks to execute one convicted of felony murder. In this context, the statute is wholly inadequate to meet the constitutional demands articulated in *Enmund*, because it does not ensure that the ultimate sentence will be reserved for those who have intended to kill. Quite simply, that is what *Enmund* demands, and what the Eighth and Fourteenth Amendments, at a minimum, require. I would grant the petition, vacate the sentence, and remand for further proceedings.